Lim Poh Choo v Absolute Ascend Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–224 OF 2005
RAMLY ALI J
1 OCTOBER 2007

Civil Procedure — Receivers — Appointment of receivers and managers — Mode of application — Jurisdiction of the High Court — Whether jurisdiction extends to appointment of managers — Whether receiver appointed by court an officer of the court — Rules of the High Court 1980 O 30

Companies and Corporations — Receivership — Appointment of receivers and managers — Interim preservation of property — Application for — Applicant a registered shareholder — Company managed without supervision by board of directors or company shareholders — Likelihood of company being pushed into liquidation — Requirement of corporate governance ignored — Whether jeopardised company — Whether interest of shareholders prejudiced — Whether fit and proper case for appointment of receivers and managers

Companies and Corporations — Receivership — Appointment of receivers and managers — Interim preservation of property — Circumstances when court would order appointment of receivers and managers

Companies and Corporations — Shares — Ownership of shares — Share certificate — Whether prima facie proof of shareholder's title to shares — Companies Act 1965 s 100

The plaintiff was a director and shareholder of the first defendant company ('the company') and was the registered beneficial owner of 90% of its issued and paid-up shares. The second defendant was a director and shareholder of the company and held 10% of its shares. He was also the chairman of the company. The plaintiff alleged that: (i) she had never received any notice for the holding of an AGM or EGM of the company; (ii) the company failed to have an AGM since 2003; (iii) reports or audited accounts of the company had never been sent to her since 2002. The plaintiff further complained that she had been kept in the dark by the second defendant concerning the control and management of the company and even refused access to information concerning the company. The plaintiff and the second defendant became

A embroiled in a civil dispute concerning the plaintiff's ownership of the company's shares. Pending resolution of the civil dispute, the plaintiff filed an application for the appointment of receivers and managers. The plaintiff intended for the receivers and managers to give a full, comprehensive and complete list of the assets and liabilities of the company.

B

Held, allowing the application with costs:

C (1) The court may make an interim order for the appointment of a receiver and manager for the preservation of property, pending the determination of a cause or matter where: (i) there is a good prima facie claim of title by the applicant; (ii) the property is in jeopardy; and (iii) the applicant would be in a worse position if the appointment is delayed (see paras 13 & 15).

D (2) Pursuant to s 100 of the Companies Act 1965, a share certificate is prima facie proof of the shareholders' title to the shares, and a company is not required to recognise beneficiaries of shares allegedly held on trust. Thus, in the instant case, the plaintiff being the registered owner E of the shares, had a good prime facie claim for title to the shares (see para 22).

(3) The company was practically being run solely by the second defendant without any supervision by the board of directors or the company F shareholders. The company appeared to be heavily in debt and only the second defendant was aware of the company's true financial status. If the debts of the company were allowed to increase without proper accountability and without the other directors and shareholders being made aware of how the liabilities were incurred, the assets and property G of the company would prima facie be in jeopardy. The second defendant's action in ignoring every requirement of the Companies Act in respect of corporate governance, were actions which jeopardized the very existence of the company (see para 29).

(4) Although the plaintiff held 90% of the paid-up capital of the defendant H and on record was also a director of the company, she had been kept in the dark concerning the management of the company and even denied access to company information. If the debts of the company become too great a burden for the company, then even if the plaintiff succeeded in the civil dispute in that the court were to find the plaintiff to be the I legal and beneficial owner of the shares, then the delay in ascertaining the actual financial status of the company could cause the company to become insolvent and hence go into liquidation. In that event, the plaintiff would suffer the greatest loss as the majority shareholder (90%) in the company (see para 32).

(5) On the other hand, if the court allowed the plaintiff's application for the appointment of receivers and managers, if their report revealed evidence of mismanagement or unlawful dissipation of the assets of company, the plaintiff would then be able to seek further orders to preserve the status quo and the assets of the company pending a final decision by the court (see para 35).

[Bahasa Malaysia summary

Plaintif merupakan pengarah dan pemegang saham syarikat defendan pertama (syarikat tersebut) dan adalah pemilik benefisial berdaftar 90% saham-saham yang diterbitkan dan berbayar. Defendan kedua merupakan pengarah dan pemegang saham syarikat tersebut dan memegang 10% daripada sahamnya. Beliau juga merupakan pengerusi syarikat tersebut. Plaintif mendakwa bahawa: (i) beliau tidak pernah menerima sebarang notis untuk mengadakan AGM atau EGM syarikat tersebut; (ii) syarikat tersebut gagal untuk mengadakan AGM semenjak 2003; (iii) laporan-laporan dan akaun-akaun syarikat yang diaudit tidak pernah dihantar kepada beliau semenjak 2002. Plaintif selanjutnya mengadu bahawa beliau tidak pernah diberitahu mengenai kawalan dan pengurusan syarikat tersebut dan juga dihalang daripada mengetahui maklumat yang berkaitan dengan syarikat tersebut. Plaintif dan defendan kedua terlibat di dalam pertikaian sivil berkaitan dengan pemilikan saham syarikat plaintif. Sementara menunggu penyelesaian pertikaian sivil tersebut, plaintif memfailkan permohonan untuk pelantikan penerima dan pengurus. Plaintif mahukan penerima dan pengurus tersebut memberikan senarai aset dan liabiliti syarikat tersebut yang penuh, menyeluruh dan lengkap.

Diputuskan, membenarkan permohonan dengan kos:

(1) Mahkamah boleh memberikan perintah interim untuk pelantikan penerima dan pengurus untuk mengekalkan harta, sementara menunggu pemutusan causa atau perkara di mana (i) terdapat tuntutan pemilikan yang prima facie baik oleh pemohon; (ii) harta tersebut dalam bahaya; dan (iii) pemohon akan berada dalam situasi yang lebih teruk jika pelantikan dilewatkan (lihat perenggan-perenggan 13 & 15).

(2) Menurut s 100 Akta Syarikat 1965, sijil saham adalah bukti prima facie pemilikan saham-saham oleh pemegang-pemegang saham, dan syarikat tidak diperlukan untuk mengenal pasti benefisiari-benefisiari saham-saham yang didakwa dipegang di bawah amanah. Oleh itu, di dalam kes ini, plaintif sebagai pemegang saham berdaftar saham-saham tersebut, mempunyai tuntutan prima facie yang baik terhadap pemilikan saham-saham tersebut (lihat perenggan 22).

(3) Syarikat tersebut adalah secara praktik diurus oleh defendan kedua tanpa penyeliaan lembaga pengarah atau pemegang-pemegang saham syarikat. Syarikat tersebut jelas banyak berhutang dan hanya defendan kedua yang mengetahui status kewangan sebenar syarikat tersebut. Jika hutang-hutang dibenarkan bertambah tanpa kebertanggungjawapan yang betul dan tanpa pengarah-pengarah dan pemegang-pemegang saham yang lain diberitahu bagaimana liabiliti-liabiliti ditanggung, prima facie akan membahayakan aset-aset dan harta syarikat. Tindakan defendan kedua dalam tidak mempedulikan setiap keperluan Akta berkaitan dengan penguasaan syarikat, adalah tindakan-tindakan yang membahayakan kewujudan syarikat tersebut (lihat perenggan 29).

(4) Walaupun plaintif memegang 90% modal berbayar defendan, dan di atas rekod adalah juga pengarah syarikat, beliau tidak diberitahu mengenai pengurusan syarikat dan juga tidak diberitahu mengenai maklumat syarikat. Jika hutang-hutang syarikat menjadi beban yang terlalu berat, walaupun plaintif menang dalam pertikaian sivil, di mana jika mahkamah mendapati plaintif adalah pemilik saham yang sah dan benefisial, maka, kelewatan dalam menentukan status kewangan yang sebenar syarikat tersebut boleh menyebabkan syarikat tersebut menjadi tidak solven dan dibubarkan. Dalam keadaan sedemikian, plaintif akan mengalami kerugian yang amat besar sebagai pemegang saham majoriti (90%) syarikat tersebut (lihat perenggan 32).

(5) Sebaliknya, jika mahkamah membenarkan permohonan plantif untuk pelantikan penerima dan pengurus, walaupun laporan mereka mendedahkan keterangan salah urus atau pelupusan aset-aset syarikat dengan melanggar undang-undang, plaintif boleh memohon perintah lanjut untuk mengekalkan status quo dan aset-aset syarikat sementara menunggu keputusan muktamad oleh mahkamah (lihat perenggan 35).]

Notes

For a case on appointment of receivers generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 5939.

For cases on appointment of receivers and managers, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 626–629.

For cases on ownership of shares, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 860–865.

Cases referred to

Bond Brewing Holdings Ltd v National Australia Bank Ltd (1990)1 ACSR 445 (refd)

Hwang Chin Hor v Song Seng Sdn Bhd (1990)1 MSCLC 90 (refd)

Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors [1985] 2 MLJ 406 (refd)

Legislation referred to

Companies Act 1965 ss 100, 132C
Rules of the High Court 1980 O 30 r 1(1), O 30 r 3

MK Yee (Shearn Delamore & Co) for the plaintiff.
S Vijayaretnam @ Veizay (K Sila Dass & Partners) for the second defendant.

Ramly Ali J:

[1] Enclosure 23 is an application by Lim Poh Choo (the plaintiff in D5–24–224 of 2005) seeking, inter alia, the following orders:

(a) That Mr Ong Kong Lai and Mr Wong Cham Mew of O & M Corporate Advisory Sdn Bhd be appointed as the receivers and managers over all the property and assets of Absolute Ascend Sdn Bhd (Company No 256342-U) the first defendant in Suit No D5–24–224 of 2005).

(b) That the receivers and managers do inquire and establish and compile a list of all assets, whether moveable or immoveable owned, leased, hired, rented or in the possession of Absolute Ascend Sdn Bhd and to render a report to this court within three months from the date of this order or within any such period as may be extended by this court.

(c) That the receivers and managers be granted access to all the books, records and documents of the company to enable them to carry out their duties as set out above.

(d) That all parties involved in the management of the company, including Lim Thian Hock @ Lim Thiam Hock, whether by themselves, their agents, servants or otherwise, do render all such assistance as the receivers and managers may require in the proper and effective discharge of their duties and that they do, within 14days from the date of this order, or within such time as the receivers and managers may allow, deliver to the receivers and managers possession, all books, records and documents of the company relating to, but without prejudice to the generality of, the assets, properties, effects of business, monies, stock-in-trade, securities, deeds, books, documents, papers and keys to all relevant premises and containers where these items are stored.

(e) That all parties, including the receivers and managers, be at liberty to apply.

(f) That the receivers and managers be entitled to recover his fees and all disbursements and expenses from the assets of the company not affected by prior charges after such fees, disbursements and expenses are approved by this court.

(g) That the costs of this application be costs in the cause.

FACTUAL BACKGROUND

[2] The plaintiff (Lim Poh Choo) is a director and shareholder of the first defendant company and is the registered and beneficial owner of 22,500 shares in the first defendant company, being 90% of the issued and paid-up share of the first defendant company.

[3] The first defendant is a company incorporated in Malaysia with a registered address at Suite 14.06, 14th Floor, Wisma Mirama, Jalan Wisma Putra, 50460 Kuala Lumpur.

[4] The second defendant (Lim Thian Hock) is a director and shareholder of the first defendant company and is the registered and beneficial owner of 2,500 shares in the first defendant company, being 10% of the issued and paid-up shares of the first defendant company. The second defendant is also the chairman of the first defendant company.

[5] From 21 March 2005 when the plaintiff (Lim Poh Choo) attempted to call for an extraordinary general meeting ('EGM') of the first defendant company until today, the plaintiff has not received a single notice from the company secretaries of the company, namely Premier Diversified Development Sdn Bhd informing the plaintiff about the date for the holding of an annual general meeting ('AGM') or even a date for an EGM of the first defendant company.

[6] From the records of the Companies Commission of Malaysia ('CCM') and from the second defendant's own admission, the first defendant company has not held an AGM since 2003.

[7] In addition, throughout the period of the proceedings before this court, (since August 2005) the plaintiff has not received a single notice from the company secretary informing the plaintiff that there is going to be a meeting of the directors of the first defendant company. The plaintiff has also to date, not received any report or audited accounts of the first defendant company since 2002. This is confirmed the by the report from the CCM.

[8] The plaintiff has repeatedly shown and stated in the affidavits filed before this court to show that the second defendant, who has day to day control over the management of the first defendant company, has repeatedly

acted without consulting the plaintiff and has repeatedly refused to allow the plaintiff to have access to information concerning the first defendant company.

RELEVANT LAW

[9] Order 30 r 1(1) of the Rules of the High Court 1980 provides for the appointment of a receiver by the court and states that the application may be made by summons or motion.

[10] The courts have recognised that there are many circumstances under which a receiver can be appointed. *The White Book (Malaysian edition) the Commentary on Order 30* states:

> The circumstances under which a receiver may be appointed or have to act are so warned that is impossible to compress them into a not without over simplification.

[11] In *Kerr on Receivers and Administrators* (17th Ed), it is stated that 'A receiver has also been appointed in a company which was effectively a quasi-partnership, where one equal shareholder had presented a petition for relief based on unfair prejudice, and there was evidence that it was likely to succeed. The appointment was made to preserve the status quo, pending judgment on the petition'.

[12] In *Corporate Receivership — The Law and Practice in Malaysia and Singapore* at p 383, the writers have tried to categorise the appointment of receivers by the courts under two heads, namely:

(i) Appointment for the preservation of property (which include, inter alia, a situation where there is deadlock or mismanagement of a company); and

(ii) Appointment for the enforcement of rights.

[13] The writers at pp 383–384, then go on to state as follows:

> Many appointments of this nature, at least in respect of company property, are made pending the resolution of disputes between shareholders or directors. In cases, where the Malaysian courts have appointed receivers over the assets of a company in situations of deadlock or mismanagement, it has been said that in ordering the appointment for the interim preservation of property pending the determination of a cause or matter, the court must be satisfied as to three fundamental issues:
>
> (i) that there is a good prima facie claim of title by the plaintiffs;
>
> (ii) that the property is in jeopardy; and

A (iii) that the applicants would be in a worse position if the appointment is delayed.

B **[14]** The writers at pp 395–396, recognise that O 30 of the Rules of the High Court 1980 would extend the statutory jurisdiction of the High Court to appoint receivers as well as managers and they refer to several Malaysian cases where both receivers and managers have been appointed:

C > Where assets are in jeopardy and, in the circumstances of serious disputes, among the shareholders or directors, the only way in which to save a company and to ensure its continued operations being the appointment of a receiver as well as a manager, the court will readily order such an appointment to preserve the property pending the determination of disputes.

D **[15]** An appointment for the object of preserving property pending the determination of a cause or matter is clearly within the jurisdiction of the court under the Judicature Acts. Any property may be made the subject matter of the appointment, so long as it forms a part of the subject matter of the proceedings.

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[16] The appointment will be made by the courts at the instance of a shareholder where there is some legal or equitable right that ought to be protected and there is no other available remedy adequate for that purpose. This proposition has been clearly recognised by the Court of Appeal in
F Australia in *Bond Brewing Holdings Ltd v National Australia Bank Ltd* [1990] 1 ACSR 445.

[17] An appointment should be ordered if there is ample evidence to suggest that the assets of the company would be dissipated or depleted or if
G substantial loss would be sustained by the continued mismanagement of its property to the detriment of the plaintiff. Thus in *Hwang Chin Hor v Song Seng Sdn Bhd* [1990] 1 MSCLC 90,377 the court granted an application for the appointment of interim receivers and managers pending the hearing of a winding up petition presented by the shareholders of the company, who
H alleged that the deputy chairman and a director of the company were siphoning funds to other companies of which they were also directors. The court ordered the interim appointment as it was satisfied that the assets were in danger of accelerated depletion in view of the presentation of the petition for the winding up of the company.

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[18] A receiver appointed by the court is an officer of the court put in to discharge certain duties prescribed by the order appointing him. He is not an agent for any other person nor is he a trustee. The receiver is appointed by the order of the court and is responsible to the court, and cannot obey the

directions of the parties in the action. His appointment is made for the benefit of all parties interested in the property subject to the appointment. A court appointed receiver is allowed such proper remuneration, if any as may be fixed by the court (see O 30 r 3 of the RHC 1980). As such the court can stipulate the remuneration of the receiver at the time of appointment.

[19] In *Hwang Chin Hor & Ors v Song Seng Sdn Bhd & Ors* [2000] 1 MSCLC 90,337, and *Matang Holdings Bhd & Ors v Dato' Lee San Choon & Ors* [1985] 2 MLJ 406, both courts reiterated the principle that the court will make an interim order for the appointment of a receiver and manager until the company's affairs were sorted out as there were serious disputes among the shareholders and as the assets were in jeopardy if three issues could be established, namely:

(i) that there is a good prima facie claim of title by the plaintiffs;

(ii) that the property is in jeopardy; and

(iii) that the applicants would be in a worse position if the appointment is delayed.

FINDINGS OF THE COURT

[20] The plaintiff has filed this application seeking very specific and limited orders with regard to the terms of appointment of the receivers and managers. These orders include the following:

(i) that Mr Ong Kong Lai and Mr Wong Cham Mew of O & M Corporate Advisory Sdn Bhd be appointed as the receivers and managers over all the property and assets of Absolute Ascend Sdn Bhd (Company No 256342-U) the first defendant in Suit No D5–24–224 of 2005);

(ii) that the receivers and managers do inquire and establish and compile a list of all assets, whether moveable or immoveable owned, leased, hired, rented or in the possession of Absolute Ascend Sdn Bhd and to render a report to this honourable court within three months from the date of this order or within any such period as may be extended by this honourable court;

(iii) that the receivers and managers be granted access to all the books, records and documents of the company to enable them to carry out their duties as set out in para 1 above;

(iv) that all parties involved in the management of the company, including Lim Thian Hock @ Lim Thiam Hock, whether by themselves, their

A agents, servants or otherwise, do render all such assistance as the receivers and managers may require in the proper and effective discharge of their duties and that they do, within 14 days from the date of this order, or within such time as the receivers and managers may allow, deliver to the receivers and managers possession, all books,
B records and documents of the company relating to, but without prejudice to the generality of, the assets, properties, effects of business, monies, stock-in-trade, securities, deeds, books, documents, papers and key to all relevant premises and containers where these items are stored.

C **[21]** The first issue to be determined, based on the authorities earlier cited, is whether there is a good prima facie claim of title by the plaintiff.

[22] In the present case the plaintiff is the registered owner of the shares and the dispute between the plaintiff and the second defendant relates to the
D beneficial ownership of the shares registered in the plaintiff's name. Under article 6 of the articles of association of the company and pursuant to s 100 of the Companies Act 1965 a share certificate shall be prima facie proof of the shareholders' title to the shares and a company is not required to recognise beneficiaries of shares allegedly held on trust.
E

[23] For this reason, and bearing in mind that both the plaintiff and the second defendant have set out their grounds showing their claim to the shares, then until this court makes a final decision on the action between the
F plaintiff and the second defendant, the plaintiff has a good prime facie claim for title to the shares..

[24] The next issue is whether the property is in jeopardy

G **[25]** The second defendant has readily admitted that the first defendant company has not held its AGM since 2003 and has not filed its audited accounts with the CCM since 2002. The plaintiff has also not been informed of any meeting of the board of directors. This means that the first defendant company is actually being run solely by the second defendant without any
H supervision by the board of directors or the shareholders of the company. The second defendant is treating the first defendant company as his personal asset.

[26] The second defendant has alleged that the first defendant's accounts for the year ending 31 December 2006 shows that the first defendant has
I liabilities of RM30,178,011.21. This is a substantial sum and under normal company law, the first defendant would require both directors and

shareholder's approval in order to be able to enter into any transaction which would incur liabilities of this size (see s 132C of the Companies Act 1965). The evidence shows there are no shareholders or even directors' resolution agreeing to the company incurring these liabilities.

[27] The second defendant has alleged that he has loaned large sums of money to the first defendant company but the last audited accounts of the company do not show any loans from directors. There are no statements as to the terms under which these alleged loans are made.

[28] The first defendant company therefore appears to be heavily in debt and only the second defendant is aware of the true financial status of the first defendant company. For the past year, the second defendant has not been in Malaysia but has instead been living in Batam, Indonesia and in Singapore. This raises the question of whether there are any directors responsible for the day to day running of the first defendant company?

[29] If the debts of the first defendant company are allowed to increase without proper accountability and without the other directors and shareholders (apart from the second defendant) being made aware of how these liabilities are incurred, how they are to be repaid, the company's cash flow position, the assets and property of the first defendant company are prima facie in jeopardy.

[30] The second defendant's action in ignoring every requirement of the Companies Act in respect of corporate governance requirements (eg the holding of shareholders and directors meeting, the filing of audited accounts, obtaining shareholders' approvals for large transactions) are actions which jeopardise the very existence of the company. If the second defendant truly considered the assets of the first defendant company as his own, he should just have either formed a business with himself as a sole proprietor or just entered into the business as an individual rather than forming a company. Now that a company has been formed, the second defendant has to be made accountable and should observe all statutory requirements.

[31] The last issue to be considered is whether the applicant (Lim Poh Choo) would be in a worse position if the appointment of receivers and managers is delayed.

[32] The plaintiff is the holder of 90% of the paid-up capital of the first defendant and on record is also a director of the first defendant company.

Although the plaintiff is a shareholder and director of the first defendant company, the plaintiff has been denied access to any information regarding the management of the company and the plaintiff is kept in the dark and prevented from attending any AGM of the first defendant company.

[33] If the debts of the first defendant company become too great a burden for the company, then even if the plaintiff were to succeed in this action and this court were to find that the plaintiff is the legal and beneficial owner of the shares, then the delay in ascertaining the actual financial status of the first defendant company may cause the first defendant company to become insolvent and hence go into liquidation.

[34] If this were to happen, the plaintiff would be the one suffering the greatest loss as she holds 90% of the shares in the first defendant company.

[35] If this court were to allow the plaintiff's application for the appointment of receivers and managers the plaintiff's intention is to ask the receivers and managers to give a full, comprehensive and complete list of the assets and liabilities of the first defendant company.

[36] If the report from the receivers and managers indicate that there is any evidence of mismanagement or unlawful dissipation of the assets of the first defendant company, the plaintiff would be able to seek further orders to preserve the status quo and the assets of the company pending a final decision by this court.

[37] The terms of the order envisage that the receivers and managers would only be appointed for a limited period of time and based on this, the requirement for security to be provided by the receivers and managers would be waived as they would not be acting in a manner which would place any of the assets of the first defendant company in jeopardy.

CONCLUSION

[38] Based on the evidence available for the present application, the court is satisfied that the plaintiff (Lim Poh Choo) had infact made out a prima act case, that the assets, properties of the first defendant company were in jeopardy and that the appointment of the interim receivers and managers would enable the present situation to be retained. The appointment of the interim receivers and managers would only be for temporary period until the hearing of the petition to oversea the financial dealings of the company is a

neutral third party. Consequently, the court allows the application by Lim Poh Choo (vide encl 23) with costs.

Application allowed with costs.

Reported by Andrew Christopher Simon